AUG 12 2002

No. 01-1698

IN THE

Supreme Court of the United States

NORRIS McCRARY,

Petitioner,

v.

CAROLYN COMSTOCK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Mr. McCrary, a prison psychologist placed Mr. Montgomery on suicide watch on March 2, 1995. Mr. McCrary removed Mr. Montgomery from suicide watch on March 3, 1995 in violation of the DOC policy directive regarding suicide prevention and without exercising professional judgment. Within several hours of being removed from suicide watch, Mr. Montgomery committed suicide in his jail cell by hanging himself.

Did the Court of Appeals err in affirming the decision of the District Court denying Mr. McCrary qualified immunity because Mr. McCrary was deliberately indifferent to the serious medical needs of Mr. Montgomery in violation of Mr. Montgomery's Constitutional rights?

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STATEMENT OF THE CASE

There are additional facts, omitted by the Petitioner, that are crucial to a complete understanding of the case and the Opinion of the 6th Circuit Court of Appeals. Mr. Montgomery, who was twenty-nine (29) years old, was sentenced on June 28, 1994 to one to five years and spent a substantial portion of his sentence in the county jail before arriving at the Reception and Guidance Center ("RGC") at the State Prison of Southern Michigan. His earliest possible release date was April 11, 1995.

On March 2, 1995, at approximately 10:55 a.m., Defendant McCrary, a prison psychologist, received a referral to see Mr. Montgomery, because Mr. Montgomery had expressed thoughts of suicide. During Mr. McCrary's meeting with Mr. Montgomery, Mr. Montgomery indicated that he wanted to kill himself. Mr. McCrary recommended that he be placed on close observational status (suicide watch).

Mr. McCrary testified that he removed Mr. Montgomery from close observational status without ever: 1) reviewing Mr. Montgomery's institutional file or medical record (which contained Defendant Howell's note regarding Mr. Montgomery's "snitch" label); 2) speaking to the custody staff member who requested the psychological referral; 3) consulting with Defendant Howell; 4) speaking with Top 6 custody staff regarding their observations of Mr. Montgomery; 5) checking the log book entries kept by the RGC control center or the Top 6 log book; 6) reviewing a battery of routine psychological tests conducted on February 27, 1995 which included: a) an MMPI-2 (Minnesota Multiphasic Personality Inventory), Draw-A-Person, Symbol Digit Modality Test, Bender-Gestalt, Rotter Incomplete

Sentences Blank, and the TABE Educational Locator Test; 7) speaking with other DOC psychologists that Mr. McCrary learned had met with Mr. Montgomery previously; or 8) allowing the Outpatient Mental Health Team to conduct an evaluation — as requested by Mr. McCrary just one day earlier. In doing this, Mr. McCrary violated DOC policy directive 04.06.115 regarding suicide prevention by: 1) failing to review the custody staff referral form CHX-2 12 (Roberta R) or alternatively, speaking with the custody officers who referred Mr. Montgomery to him; 2) failing to complete an evaluation of suicide risk prisoners (form CHJ-180) and to review Mr. Montgomery's institutional file and health record; and 3) failing to complete a written health record (progress note) when moving Mr. Montgomery from close observation.

Had Mr. McCrary conducted even a simple and routine investigation into the reasons behind Mr. Montgomery's suicidal ideation, he would have learned that: Mr. Montgomery had been labeled a snitch and was being threatened by other inmates; Mr. Montgomery told custody staff that the other inmates were going to kill him; Mr. Montgomery refused to leave his cell; Mr. Montgomery had been seen by two other RGC psychologists; and the results of Mr. Montgomery's MMPI.

Brian Smith, a DOC psychologist and Mr. McCrary's peer, conducted a suicide autopsy shortly after Mr. Montgomery's suicide. He found that on March 2, 1995 at 10:55 a.m., custody officer Mark Kurpenski asked Mr. McCrary to see Mr. Montgomery. Apparently, Mr. Kurpenski observed 1) Mr. Montgomery as being despondent and 2) indicated that the previous third shift officers had removed some potentially lethal items from Mr. Montgomery's cell over concerns for his safety.

Mr. Smith's report concluded that based upon a review of information contained in the record and information gleaned from discussion with staff, Mr. Montgomery's suicide was "motivated out of fear and a desperate desire to regain an illusion of self-control". (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 7, p. 3). According to Mr. Smith's report, "hearsay and documented evidence suggests that he succumbed to the mental abuse and insidious manipulation of other inmates occupying nearby cells, who threatened to harm Mr. Montgomery at first opportunity. Somewhere along the line he was identified as a snitch." (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 7, p. 3). Mr. Smith concluded that Mr. Montgomery did not "have the personal resources to effectively cope with the stressors of this environment." (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 7, p. 3).

This suicide autopsy included a review of: 1) Mr. Montgomery's medical file; 2) Mr. Montgomery's institutional file; 3) the Control Center logbook and the Top 6 logbook; and 4) interviews with staff. (R. 41, Brief in Support of Plaintiff's Motion for Summary Deposition. Exhibit 12, Deposition of Brian Smith, pp. 11- 13.) All of this information that was available to Mr. McCrary prior to his decision to remove Mr. Montgomery from close observation.

Dr. Robert Walsh, Administrator of Psychological Services for the Jackson Clinical Complex (Bureau of Health Care Services for the Department of Corrections)[1], testified

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1. On March 3, 1995, Dr. Walsh supervised McCrary's supervisor, Dr. Bruce Wright, clinical supervisor/chief psychologist for the Central Complex general population.

at deposition. While Dr. Walsh agreed with Mr. McCrary's assessment that Mr. Montgomery was a moderate suicide risk, he unequivocally testified that middle range suicidal behavior/risk, like that exhibited by Mr. Montgomery, is the most difficult, intensive and time consuming to diagnose because it is the hardest to sort out. Dr. Walsh added that clinicians needed to be extra aware of people in that position as they can rapidly shift in either direction due to pressure from the environment.

Dr. Walsh testified that he gathers as much information as possible prior to conducting an evaluation, so that a thorough and comprehensive evaluation may be completed. In particular, Dr. Walsh testified that he would: 1) view the inmate's file; 2) talk with custody officers; 3) look at the MMPI in every case because: (a) it is the "best single psychological test that we have", (b) it gives a comprehensive picture of the inmate's mental health status, and (c) it is one of the more important sources of information available (Dr. Walsh stated that he has an expectation that Mr. McCrary would review the results of the MMPI); 4) review the logbooks; and 5) interview the inmate to compare what he is saying to what he said the day before.

Dr. Walsh explained the critical nature of this information. Dr. Walsh stated that he simply would not feel comfortable taking an inmate off close observation without reviewing all available information. Specifically, he would never take an inmate off close observation without reviewing the medical file because he would not want to miss anything that might affect his decision. Second, he would talk to custody officers, which he stated is done routinely, because they provide valuable behavioral observations unavailable through a simple interview with the inmate. As an inmate

might not be totally forthright in his responses to important questions posed during the interview, the best material comes from a separate observer. Dr. Walsh would want to know the reasons behind the inmate referral to the psychologist. In sum, Dr. Walsh stated that it is "inconceivable" that he would not get all of the above information if it were available.

Brian Smith testified, at deposition, that: 1) it is important for the treating psychologist to know that a patient has been described as "despondent" and that custody staff removed potentially lethal items from inmate's cell; 2) a psychologist would want to know what custody staff observed and would want to get as much information as possible; 3) it is "routine" to talk to custody officers in the cellblock regarding their observations of the patient; 4) the MMPI provides the psychologist helpful information; and 5) it is helpful to review the medical file, and, in fact, Mr. Smith never released an inmate from close observational status without at least reviewing the medical file. Finally, Brian Smith testified that everything he reviewed while conducting the suicide autopsy could have been reviewed by Mr. McCrary.

Both Dr. Walsh and Brian Smith testified that the fear might be so overwhelming that an inmate may choose suicide. Dr. Walsh even went as far as to say that fear, a very real thing at RGC, may cause someone who otherwise might not be suicidal to become suicidal. Brian Smith concurred in this observation.

The Respondent's expert, Dr. Gerald Sheiner, testified at deposition that Mr. McCrary failed to make an adequate assessment of Mr. Montgomery's suicide risk and ignored obvious and glowing factors in a very cavalier manner.

He stated that Mr. McCrary's note that "I took him at his word" demonstrates the cavalier manner Mr. McCrary employed in making an assessment of suicide risk. Mr. McCrary simply ignored the obvious. He stated that Mr. McCrary's evaluation was "grossly inadequate" and that he used none his professional skills in making the assessment. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 15, p. 69).

REASONS FOR DENYING THE WRIT

McCrary has not presented any compelling reason for this Court to exercise discretionary jurisdiction over his appeal of the denial of his claim to governmental immunity. Mr. McCrary seeks review of an alleged misapplication of a properly stated rule of law.

This Court should deny certiorari because the holding of the Court of Appeals is consistent with this Court's holdings in *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994).

A. Mr. McCrary's actions violated Mr. Montgomery's Constitutional rights under the Eighth Amendment.

The law is clearly established that government officials are not immune from liability "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate constitutional rights of the plaintiff". *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). The defendant has the burden of showing that he was performing discretionary acts for which the qualified immunity defense is available. *Poe v. Haydon*, 853 F.2d 416 (6th Cir. 1988). The qualified immunity defense is not available if it is shown that the

defendant violated clearly established law that he should have known about. Whether the law was clearly established is a legal question for the court to determine. *Heflin v Steward County, Tenn.*, 958 F.2d 709, 717 (6th Cir. 1992); *Anderson v Creighton, supra.*

Mr. McCrary asserts before this Court, as he did before the Court of Appeals that because he rendered medical treatment, he is entitled to governmental immunity. This argument is a misstatement of the applicable law and is contrary to the cases and analysis cited in his own Petition. This Court recognized in *Estelle, supra*, that a response to the serious medical needs of an inmate could constitute deliberate indifference.

The test for qualified immunity does not turn on the subjective good faith of the official, but rather turns on the "objective legal reasonableness of the action, assessed in light of legal rules clearly established at that time." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 819 (1981). It would not make any sense to permit a prison official who deliberately ignored the serious medical needs of an inmate to claim that it would not have been apparent to a reasonable person that such actions violated the law. *See Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992) ("A finding of deliberate indifference necessarily precludes a finding of qualified immunity.")

"Where prison officials are so deliberately indifferent to the serious medical needs of prisoners as to unnecessarily and wantonly inflict pain, they impose cruel and unusual punishment in violation of the Eighth Amendment." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994). *Estelle v. Gamble, supra.*

In *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811 (1994), this Court held that deliberate indifference requires that "the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*, 114 S. Ct. at 1978. Under this standard, "an official's failure to alleviate a significant risk that he should have perceived but did not" cannot be considered a violation of the Eighth Amendment. *Id.* If a prison official knows of a substantial risk of harm, but the harm occurs anyway, the official is not liable if he responds reasonably to that risk. *Id.*, 114 S. Ct. at 1982-83. If an Eighth Amendment plaintiff presents evidence showing that a substantial risk was longstanding, pervasive, well-documented, or expressly noted by the prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus, 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk. *Id.* 114 S. Ct. at 1982.

This Court in *Farmer* adopted the subjective test, reasoning that "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under our cases be condemned as the infliction of punishment" in violation of the Eighth Amendment. *Id.* 114 S. Ct. at 1979. The Court stated that all federal courts agree that deliberate indifference is more than mere negligence and less than actual intent. *Id.* 114 S. Ct. at 1970.

The Court outlined a three part inquiry for determining qualified immunity as: (1) did a Constitutional violation occur; (2) was the right that was violated a clearly established

right of which a reasonable person would have known; and (3) did the plaintiff allege sufficient facts, supported by evidence, to indicate that what the official did was objectively unreasonable in light of the clearly established Constitutional right. *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999).

In *Williams v. Mehra, supra*, the Court, in finding the Plaintiff failed to show deliberate indifference, said "[t]here is nothing to suggest that the doctors were failing to treat Wade or doing less that their training indicated was necessary." The action complained of was the failure of the doctors to change medication from tablets, which Wade was known to hoard and use to try to commit suicide, to liquid. To minimize the chances that Wade would be able to hoard the pills, they were distributed to him in a pill-line where a nurse would watch him take the medication. There is no question that Wade was being treated and treated in a manner, by use of the pill line, that demonstrated an appreciation for the risk that he would commit suicide and do so by hoarding medication.

While the principles are applicable, *Williams* is easily factually distinguishable from the situation before this Court involving Mr. Montgomery. The crux of the complaint is that Mr. McCrary failed to treat Mr. Montgomery and did less than his training indicated was necessary. Mr. McCrary disregarded DOC policy regarding suicidal inmates and did not properly treat or investigate Mr. Montgomery's condition and mental state. **McCrary admitted that he did not properly investigate Mr. Montgomery's case due to workload pressures.** (R. 63, Plaintiff's Response to Defendants' Renewed Motion for Summary Judgment Based on Qualified Immunity, Exhibit 1, Deposition of Norris McCrary, pp. 228-233). Dr. Walsh even stated "it's

inconceivable" that he would not get all the information that was available to McCrary to assess Mr. Montgomery's suicidal risk/intent.

Mr. Montgomery demonstrated to Mr. McCrary a strong likelihood that he would attempt to take his own life. Mr. McCrary admits that he subjectively perceived the risk of suicide. Specifically, Mr. McCrary's progress note dated March 2, 1995 states:

> Inmate reports feeling depressed. Stated that he last thought of suicide on 3/1/95 at HS . . . Stated that his nerves are shot and that he "feels like he's going to die" . . . Currently, Inmate reports feeling suicidal but with no specific plan. Lethality however appears to be moderate. Recommend inmate be placed on close observation in a Bam-Bam suit (suicide prevention garment) and finger foods. . .[2]

(R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 2).

Deliberate indifference can be inferred when a decision substantially departs from accepted medical judgment and it can be demonstrated that the decision was not based on

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2. According to Defendant Howell, McCrary failed to include his March 2, 1995 progress note in the medical file. Defendant Howell testified that if McCrary had included his progress note in the file, then he would have taken a different approach with Mr. Montgomery on March 3, 1995. In particular, he would have questioned Mr. Montgomery more carefully, and contacted McCrary with his findings. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 4, pp.131-133).

accepted medical judgment. *Sanville v. McCaughtry*, 266 F.3d 724 (2001); *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

It is Mr. McCrary's failure to take any precautions prior to removing Mr. Montgomery from close observation on March 3, 1995 that demonstrates a deliberate indifference to the subjectively perceived mental health needs of Mr. Montgomery. Specifically, Mr. McCrary's "evaluation" and investigation of Mr. Montgomery's mental health — prior to removing him from close observational status on March 3, 1995 — consisted of nothing more than a short interview through a door which lasted less than one half of an hour. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, p. 166). This interview framed the basis of Mr. Montgomery's removal from close observation.

Mr. McCrary explained that he took Mr. Montgomery "at his word that he wasn't feeling suicidal" on March 3, 1995. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, p. 97; R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 5, Logbook entry dated March 3, 1995). Mr. McCrary's failure to conduct any investigation and simply taking Mr. Montgomery at his word is perhaps most troubling because Mr. McCrary admits that an inmate may lie to a psychologist so that he may carry out a suicide. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, pp. 85, 86). Mr. McCrary admits that he is not surprised that Mr. Montgomery was less than forthcoming on March 2, 1995 when Mr. McCrary inquired into whether other inmates were "pressing" him. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, pp. 192, 193).

Mr. McCrary also deliberately ignored fundamental, basic, and essential sources of critical information regarding Mr. Montgomery's mental health. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, pp. 115, 117, 157, 158, 159-161, 169).

The voluminous record in this case, including Mr. McCrary's own testimony, reveals that absent Mr. McCrary's reckless indifference to Mr. Montgomery's serious mental health needs, Mr. Montgomery would likely have made it out of the RGC alive. Mr. McCrary in failing to review the available records, failed to discover that Mr. Montgomery was being threatened by other inmates, and, in fact, had been labeled a "snitch" by other inmates. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition).

Every witness deposed in this case testified that the snitch label carries a dubious and onerous distinction for an inmate. Defendant David Howell testified that snitches are sometimes targets for retaliation and retribution and that the snitch label can put an inmate in peril. Brian Smith stated that inmates who are labeled snitches are targeted. Mr. McCrary stated that "a prisoner definitely does not want to be labeled a snitch, that's probably the worst label that you can — could have put on you if you were in prison." (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, p. 179).

Dr. Walsh testified that he would want to know about the 'snitch' label. He stated that the mere fact that Mr. Montgomery perceives it is significant. Thus, he would need to gauge the severity and extent of his reaction to it in terms of protecting himself because such a label may compel

him to commit suicide. Dr. Walsh acknowledged the possibility that an inmate would commit suicide based on threats from other inmates. Dr. Walsh would want to address this fear because prisons are a "very hostile, negative, negatory — type place." "It's scary for someone who hasn't been in there before and a lot of prisoners are scared. It's common." (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 16, pp. 93, 94).

Mr. McCrary testified that he felt that "it's a good chance that he [Mr. Montgomery] could have made it out of the prison alive" if Mr. Montgomery were placed in protective custody. He stated that "had he been on close observational status, there's a good chance he could have left prison alive". (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, p. 204). Mr. McCrary also stated that if he knew that Mr. Montgomery were being pressed, called a snitch, and had reported, "They are going to kill him", he would not have removed him from close observational status on March 3, 1995 because he would have determined him to be a suicide risk. (R. 41, Brief In Support of Plaintiff's Motion for Summary Disposition, Exhibit 8, pp. 206, 207, 248).

The record unequivocally demonstrates that Mr. McCrary subjectively perceived the risk of suicide on March 2, 1995; but failed to take adequate precautions to ascertain the reasons behind Mr. Montgomery's suicidal ideation. Mr. McCrary deliberately ignored sources of critical information because of his busy work schedule. Mr. McCrary consciously made the decision not to review the available information, which would have confirmed Mr. Montgomery's suicidal ideation. Mr. McCrary himself, admits that if he had the critical information, which he would have if he had not intentionally ignored it, he would have made a different decision and

Mr. Montgomery likely would have made it out of RGC alive. Instead, he merely relied upon Mr. Montgomery's representations, made less then twenty-four hours later, that he was no longer suicidal. As a result, with deliberate indifference Mr. McCrary removed Mr. Montgomery from close observation.

In doing so, McCrary failed to provide the adequate level of care. McCrary failed to utilize any of the critical resources at his disposal that undoubtedly and admittedly would have revealed the motivation behind Mr. Montgomery's suicidal ideation. As a result of McCrary's failure to exercise professional judgment and his reckless and deliberate indifference, Mr. Montgomery "succumbed to the mental abuse and insidious manipulation of other inmates occupying nearby cells, who threatened to harm Mr. Montgomery at first opportunity".

Dr. Walsh and Mr. Smith testified extensively at deposition of the actions that Mr. McCrary should have taken, in order to exercise accepted medical judgment in the evaluation of Mr. Montgomery. They each testified concerning the availability of documentation accessible to Mr. McCrary that would have been invaluable in evaluating Mr. Montgomery. Dr. Walsh even went as far as to testify that it was inconceivable not to get information from the medical file and custody officers so that he could comfortably remove an inmate from suicide observation. Dr. Sheiner, the Plaintiff's expert, stated unequivocally that Mr. McCrary's evaluation of Mr. Montgomery was "grossly inadequate" and in making the assessment, Mr. McCrary used none of his professional skills.

This testimony alone establishes deliberate indifference on the part of Mr. McCrary to Mr. Montgomery's serious medical needs. There is sufficient evidence from which it could be determined that Mr. McCrary was deliberately indifferent to the serious medical needs of Mr. Montgomery. At the very least, a question of fact existed and denial of governmental immunity to Mr. McCrary was proper.

Mr. McCrary's response to the substantial risk of harm to Mr. Montgomery was not reasonable. As a result, he is subject to liability for his acts and/or omissions. *Farmer v. Brennan, supra.*

The Court of Appeals appropriately evaluated Mr. McCrary's claim for governmental immunity. The Court, applying the principles set forth in *Estelle, supra*, and *Farmer, supra*, looked at whether Mr. McCrary had subjective knowledge that Mr. Montgomery posed a serious risk of harm to himself. The Court concluded that the evidence, including Mr. McCrary's own admissions, established that Mr. McCrary knew that Mr. Montgomery posed a serious risk of harm to himself.

The Court then went on to evaluate whether the evidence demonstrated that Mr. McCrary disregarded the risk of serious harm. In doing so, the Court again applied the principles of *Farmer, supra*, and *Williams, supra*. The Court evaluated all of the evidence that was presented and admitted by Mr. McCrary and concluded that there was ". . . an abundance of evidence that McCrary did not respond reasonably to the substantial risk of harm . . ." (Petition for Writ of Certiorari, p 25a).

The analysis of the Court of Appeals was consistent with this Court's holdings in *Estelle*, *supra*, and *Farmer*, *supra*. The Court then went on to evaluate whether the law was clearly established.

B. Mr. McCrary acted in violation of clearly established law.

There are a number of ways to determine whether the law is clearly established. Supreme Court decisions may be a basis upon which to conclude that the law is clearly established. Lower court decisions in the jurisdiction is another basis for concluding that the law is clearly established. *Russell v. Coughlin*, 910 F.2d 72 (2d Cir. 1990). The law may be clearly established by decisions in analogous cases. It is not required that the exact facts of the case in question mirror prior court decisions. "For a right to be clearly established, it is not necessary that the very action in question have previously been held unlawful." *Jackson v. McIntosh*, 81 F.3d 112, 113-24 (9th Cir. 1996); *Yvonne L. v. New Mexico Dept. of Human Services*, 959 F.2d 883, 889 (10th Cir. 1992).

A prisoner has a clearly established right to treatment for his serious medical needs. *Estelle*, *supra*; *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). This clearly established right existed at the time that the Defendant in this case, Mr. McCrary, was acting.

The Court of Appeals assessed whether the law was clearly established so that Mr. McCrary could have understood that his conduct was in violation of the right to treatment. The Court, following the law promulgated by the Courts in *Estelle*, *supra*, *Williams*, *supra*, and *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001),

determined that the law was such in 1995 that a reasonable prison psychologist would have understood that he had an affirmative duty to provide reasonable medical care to Mr. Montgomery, who he knew was suicidal.

Mr. McCrary could have determined that his actions were unlawful or unreasonable. The fact that Mr. McCrary did not follow DOC policy directive 04.06.115 regarding suicide prevention combined with his accepting Mr. Montgomery at his word that he did not have a specific plan for killing himself are sufficient to establish liability. *Terrance v. Northville Regional Psychiatric Hospital*, 286 F.3d 834 (2002). In this case, we further have Mr. McCrary's peer, Mr. Smith, and supervisor, Dr. Walsh, indicating that Mr. McCrary's conduct was unreasonable. This is much more than Ms. Comstock asserting that there were other ways to care for Mr. Montgomery. The evidence supports that what Mr. McCrary did do was unreasonable, insufficient and substantially departed from accepted professional judgment so as to demonstrate that his decision was not based on professional judgment. *Sanville*, *supra*. As such, there is a violation of Mr. Montgomery's Eighth Amendment rights for which Mr. McCrary is liable.

The law is clear in requiring that Mr. McCrary do more than administer care to Mr. Montgomery to avoid liability. Clearly, Mr. McCrary had an obligation to act in conformance with the DOC policy directives and in conformance with accepted professional judgment. Mr. McCrary, as demonstrated herein, failed to act in conformance with the DOC policy directive regarding suicide prevention, failed to do what his peer and supervisor minimally expected for a person in his position and failed to act in conformance with accepted medical judgment to the extent that his decisions

reflected lack of judgment. Mr. McCrary's actions were a violation of a clearly established right and he knew his conduct was in violation of this right to treatment.

As the Court of Appeals opinion is in direct accord with Supreme Court precedent, this Court should deny the Petition for Certiorari and affirm the Court of Appeals.

CONCLUSION

For all of these reasons, Mrs. Comstock respectfully requests this Court to deny Certiorari and affirm the Court of Appeals.

Respectfully submitted,

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